DOCUMENT RESUME

ED 199 979 EC 132 481

TITLE	Study of Procedures for Determining the Least Restrictive Environment (LRE) Placement of Handicapped Children. Final Report. Activity 3: Legal Analysis.
INSTITUTION	Applied Management Sciences, Inc., Silver Spring, Md.
SPONS AGENCY	Bureau of Education for the Handicapped (DHEW/OE), Washington, D.C.
PUB DATE	Jan 80
CONTRACT	300-78-0427
NOTE	61p.; For related documents, see EC 132 479-483.
EDRS PRICE	MF01/PC03 Plus Postage.
DESCRIPTORS	Compliance (Legal); Court Judges; *Court Litigation; *Disabilities; *Due Process; Elementary Secondary Education; *Hearings; Legal Problems; Legal Responsibility; *Mainstreaming; *Student Placement
IDENTIFIERS	*Education for All Handicapped Children Act

ABSTRACT

The study examined standards applied by judges and hearing officers in deciding disputes related to the least restrictive environment (LRE) placement of handicapped children. The historical basis of the requirement is reviewed, focusing on court decisions; the requirements of P.L. 94-142, the Education for All Handicapped Children Act regarding LRE are explained, and the perspectives of judges and administrative hearing officers are discussed. Analysis of 121 placement decisions from nine states is provided, with major findings including: the overwhelming majority of decisions are from appeals by parents rather than local school systems; in most cases parents want a more restrictive (most frequently private school) placement than that recommended by the local school system; LRE is discussed in less than one half of the cases where LRE placement is ordered; and where the LRE requirement is discussed, it is equally minimally and perfunctorily handled. Eleven recommendations are made for improving hearing decisions, including a descriptive definition of the arguments for and against proposed placement, an estimate of the good faith of the party proposing the placement, and a discussion of specific conditions which need to be satisfied for moving a student into a less restrictive setting in the future. (CL)

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STUDY OF PROCEDURES FOR DETERMINING THE LEAST RESTRICTIVE ENVIRONMENT (LRE) PLACEMENT OF HANDICAPPED CHILDREN

FINAL REPORT ACTIVITY 3: LEGAL ANALYSIS

January 1980

Prepared for:

DHEW/Office of Education
Bureau of Education for the Handicapped
Under Contract No. 300-78-0427

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In Cooperation With
Applied Management Sciences

This report was produced under a contract with the Department of Health, Education and Welfare, U.S. Office of Education. Opinions expressed by non-Departmental staff do not necessarily reflect the position or policy of the Office of Education or the Department, and no official endorsement should be inferred.

EC132481

APPLIED MANAGEMENT SCIENCES

STUDY FOR DETERMINING THE LEAST RESTRICTIVE
ENVIRONMENT (LRE) PLACEMENT FOR
HANDICAPPED CHILDREN

ACTIVITY 3: LEGAL ANALYSIS
EXECUTIVE SUMMARY

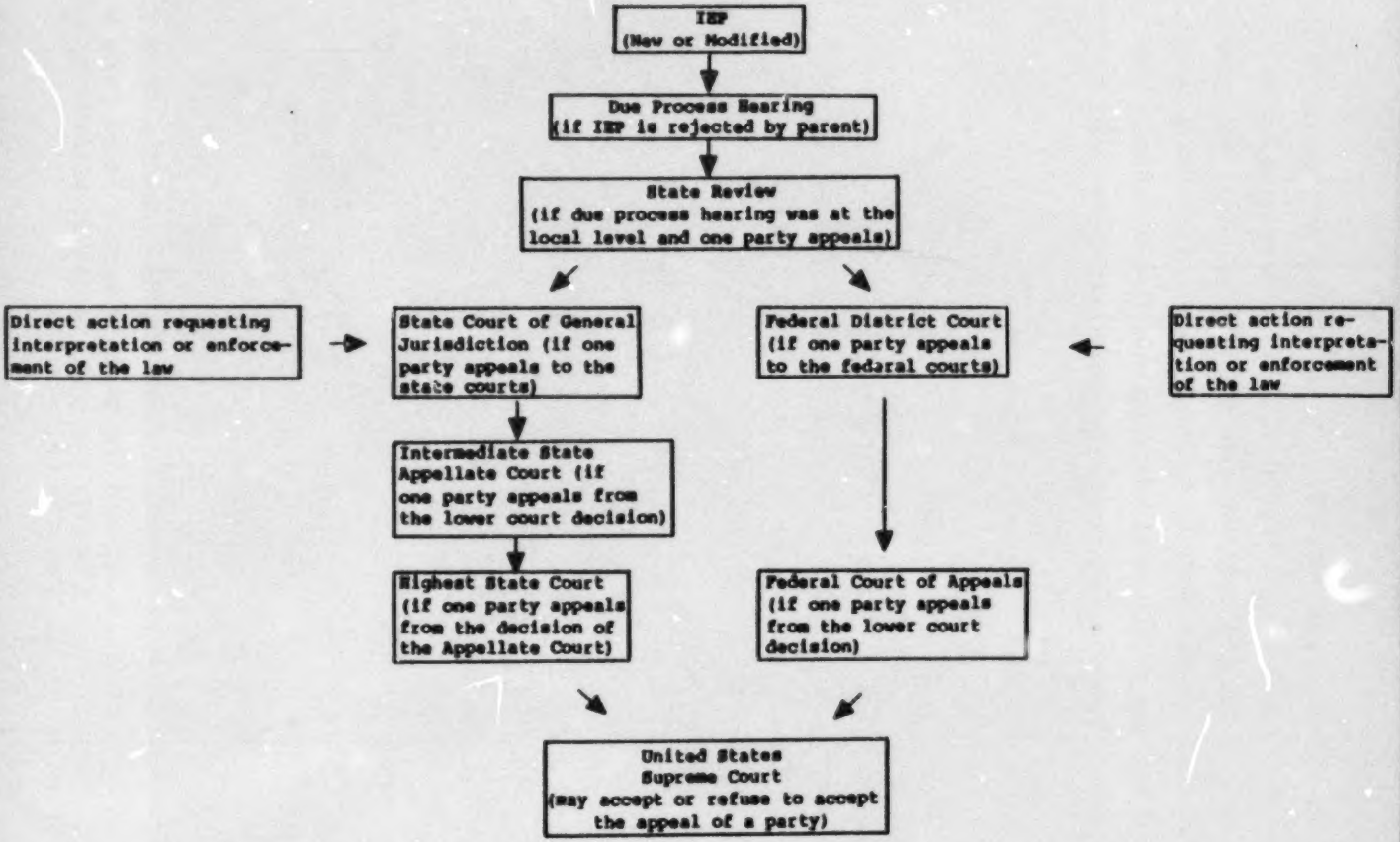
P.L. 94-142 requires each state to establish procedures to ensure that "to the maximum extent appropriate" handicapped children are educated with those children who are not handicapped. The purpose of this Legal Analysis has been to determine what standards are applied by judges and hearing officers in deciding disputes related to the least restrictive environment (LRE) placement of handicapped children. These placement disputes usually involve parents and local school systems. The process whereby such disagreements reach the level of a judicial or administrative hearing is summarized in the chart entitled "Administrative and Judicial Processes Under P.L. 94-142."

Regarding the judicial review process, it can be concluded that courts are assisting in the implementation of the least restrictive environment (LRE) principle by ensuring that all program alternatives required by P.L. 94-142 are available to all handicapped children on an equal basis according to each child's particular needs. For example, in cases where local districts refuse to provide or pay the cost of certain placements (usually costly private facilities) or to educate children with specific types of handicaps (those who present major disciplinary problems), judicial decisions have generally been in favor of parents and their handicapped children. In some of these cases, the LRE requirement has been an explicit part of the rationale for the decision.

With regard to administrative hearing officers, the conclusion is less clear. An analysis of 121 administrative decisions from nine states (described on the chart entitled "Cumulative Summary of State Administrative Decisions") provides the following information:

1. The overwhelming majority of decisions are from appeals by parents rather than local school systems;
2. In most of these appeals the parents want a "more restrictive placement, most frequently a private school placement, than that proposed by the local school system;

ADMINISTRATIVE AND JUDICIAL PROCESSES UNDER P.L. 94-142


IEP
(New or Modified)
Due Process Hearing
(if IEP is rejected by parent)
State Review
(if due process hearing was at the local level and one party appeals)
Direct action requesting interpretation or enforcement of the law
State Court of General Jurisdiction (if one party appeals to the state courts)
Federal District Court (if one party appeals to the federal courts)
Direct action requesting interpretation or enforcement of the law
Intermediate State Appellate Court (if one party appeals from the lower court decision)
Highest State Court (if one party appeals from the decision of the Appellate Court)
Federal Court of Appeals (if one party appeals from the lower court decision)
United States Supreme Court
(may accept or refuse to accept the appeal of a party)

CUMULATIVE SUMMARY OF STATE ADMINISTRATIVE DECISIONS

State	No. of Decisions Reviewed	No. of Appeals by Parents		No. of Appeals by LEA		No. Where Parents Wanted MRE		No. Where Parents Wanted LRE		LRE Ordered		LRE Not Ordered	
		W	L	W	L	W	L	W	L	Discussed	Not Discussed	Discussed	Not Discussed
1	12	5	5	0	2	3	4	4	1	3	5	2	2
2	20	14	6	0	0	13	6	1	0	4	3	2	11
3	19	3	16	0	0	1	15	2	1	10	7	0	2
4	8	4	4	0	0	2	2	2	2	2	2	0	4
5	11	2	7	1	1	3	8	0	0	4	4	0	3
6	12	4	8	0	0	3	7	1	1	2	6	0	4
7	12	4	7	0	1	2	6	3	1	2	7	0	3
8	20	8	12	0	0	8	12	0	0	4	8	2	6
9	7	3	4	0	0	3	2	0	2	1	1	2	3
Total	121	47	69	1	4	38	62	13	8	32	43	8	38

3. Parents lose the overwhelming majority of these cases, i.e., cases where they want a "more restrictive placement" but they win most of the relatively few cases where they want a "less restrictive placement" than that proposed by the local school system;

4. The LRE requirement is discussed in less than half of the cases where the least restrictive placement is ordered. It is rarely discussed where the more restrictive placement is ordered; and

5. Where the LRE requirement is discussed, the discussion is generally minimal and perfunctory.

Thus, although the "least restrictive placement" is ordered in the large majority of cases, most of these decisions make no reference to the LRE requirement, and those which do, do so superficially. One could conjecture that in these cases it appears that placement decisions are made for reasons other than because they are appropriate or less restrictive than other alternatives. Perhaps political and/or financial reasons are the motivators for selecting a public school placement over one in a private setting. In such instances, the LRE principle may be inappropriately used to justify an available public placement and may artificially reflect a commitment to LRE which is in reality motivated by other factors.

In order to know more definitively whether hearing officers are properly implementing the LRE requirement, procedures and standards need to be established to define more clearly the information which should be presented at hearings and included in administrative decisions. In particular, it is recommended that the following information, which is currently absent from most hearing decisions, be required to be presented at hearings and contained in the decisions of hearing officers:

1. A descriptive definition of the LRE requirement, indicating its relationship to the broader standard of an "appropriate placement" (this might include a statement of whether there is a presumption in favor of the least restrictive placement or whether the LRE requirement is merely one of several factors to be considered);

2. A detailed description of the child's current placement (the description of all placements should be in sufficient detail so that a clear indication is given of time to be spent with non-handicapped peers in the various programs, e.g., phrases such as "private day school" or "resource room" would be insufficient without further elaboration because they do not provide such indication);

3. A discussion of the arguments of both sides concerning why they consider the current placement to be appropriate or inappropriate;

4. A detailed description of the proposed placement including a discussion of the arguments of both sides for and against this placement;

5. A discussion of whether the proposed placement actually exists or is likely to exist when it is needed;

6. A discussion of the success or failure of past efforts to provide appropriate placements for the child;

7. An estimate of the good faith of the party proposing the placement;

8. A discussion of the past performance of the child in relation to the placement which is being proposed, e.g., an indication of whether the child has had a record of failure or success in similar programs;

9. An analysis of whether the placement which is being ordered is more or less restrictive than a) the child's current placement and b) the placement being proposed by the losing party if that placement is different from the current one;

10. An analysis of the actual weight given to the LRE requirement relative to other considerations, particularly where the most restrictive of the placement alternatives is the one being ordered, but also in other cases (this should be a detailed analysis rather than a mere pro forma repetition of the LRE requirement); and

11. A discussion of the specific conditions which need to be satisfied for a child to move to a less restrictive placement in the future.

Procedures and standards requiring this information to be presented at hearings and included in decisions would have at least two beneficial results. First, some substance would be given to the general standard of "appropriateness" providing the parties and the hearing officer with some guidelines for determining when a placement is appropriate. Second, persons reviewing the decisions, such as chief state school officers and judges, would have a sufficient basis for determining the manner and extent to which the requirement is being implemented. Both of these results would contribute to a more rational decision-making process.

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Introduction

The purpose of this component of the "Study for Determining the Least Restrictive Environment (LRE) Placement of Handicapped Children" is to describe and analyze how the "least restrictive environment" requirement (referred to in this report as the "LRE requirement") of P.L. 94-142 is being implemented by judges and administrative hearing officers. To accomplish this purpose, this report will include the following: (1) a summary of the historical basis of the requirement, focusing on relevant court decisions; (2) a description of the requirement, as specified in P.L. 94-142 and its regulations; (3) an analysis of the requirement, from the perspective of judges and administrative hearing officers; (4) an analysis of how the requirement is being implemented in court and administrative decisions; and (5) a conclusion which summarizes and comments on the findings.

I. Summary of the Historical Basis of the LRE Requirement

The following is a brief summary of the legal background of the LRE requirement of P.L. 94-142. A more detailed discussion is available in the articles which appear in the recent publication of the Bureau of Education for the Handicapped entitled: "Criteria Study 2: Developing Criteria for the Evaluation of the Least Restrictive Environment Provision" (1978).

From a legal perspective, the LRE requirement of P.L. 94-142 is the result of several distinct lines of cases culminating in the landmark "right to education cases" of the early 1970s which will be discussed later in this section. The first line of cases, which began in the early nineteenth century and which is typified by such landmark Supreme Court cases such as McCulloch v. Maryland and Anderson v. Dunn, enunciates the general principle of constitutional interpretation that when the government seeks to regulate the lives of its citizens, it must do so in a manner which is both "appropriate" and "plainly adapted" to the goal of the regulation. This principle is deeply rooted in the reaction to the abuse of governmental authority which was a major cause of the American

Revolution and is reflected in the numerous prohibitions of such potential abuse contained in the Bill of Rights and the subsequent Amendments to the Constitution, most notably the Fourteenth Amendment.

The clearest modern statement of this principle of control of excessive government regulation is contained in the case of Shelton v. Tucker (1960), where the United States Supreme Court, in striking down an Arkansas statute that required all public school teachers to report every organization with which they were affiliated, said:

> In a series of decisions this court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

This broad principle of limitation of governmental regulation has been applied in a variety of contexts, particularly in the area of free speech and association.

Of particular relevance to the LRE requirement of P.L. 94-142 is the application of this principle of limitation of governmental regulation to institutionalized mentally retarded and mentally ill persons. In a line of cases establishing the right of "habilitation" of mentally retarded persons in state institutions, the federal courts have declared, to varying degrees, that such persons have the right to habilitation in the "least restrictive setting." The strongest statement of this right is contained in the decision in Halderman v. Pennhurst State School and Hospital (1977), where a federal district court judge ordered a Pennsylvania institution for the mentally retarded to be emptied of its inhabitants because of its inherent inability to provide "minimum habilitation" to its residents. Central to the court's opinion was the following statement:

> All admissions to state facilities, be it through court commitment, or otherwise, entail an infringement on fundamental rights and freedoms . . . . Because of this, due process demands that if a state undertakes the habilitation of a retarded person, it must do so in the least restrictive setting consistent with that individual's habilitative needs. As we have heretofore pointed out, isolation and

> confinement are counter-productive in the habilitation of the retarded. Furthermore, since the law recognizes that habilitation, other than in the least restrictive setting, is a violation of one's constitutional rights, there is no question that Pennhurst, as an institution for the retarded, should be regarded as a monumental example of unconstitutionality with respect to the habilitation of the retarded. The Commonwealth and its subdivisions have a constitutional duty to explore and to provide the least stringent practicable alternatives to confinement of retarded individuals at Pennhurst.

This emphasis on habilitation in the least restrictive environment is also contained in virtually all of the decisions and consent decrees involving the rights of institutionalized mentally retarded persons. (See, for example, Wyatt v. Aderholt in Louisiana, the "Willowbrook" case in New York (New York Association for Retarded Children, Inc. v. Carey), Horacek v. Exon in Nebraska, and most recently (1979), the "Fernald" (McEvoy v. Mitchell), "Wrentham" (Massachusetts Association for Retarded Citizens, Inc. v. Dukakis) and "Dever" (Massachusetts Association for Retarded Citizens, Inc., Paul A. Dever Association for Retarded Citizens, Inc. v. Dukakis) cases in Massachusetts).

An example of the application of the "least restrictive setting" principle to the mentally ill is Welsh v. Likens, a 1974 Minnesota federal court decision where the court noted the widespread "acceptance by the courts of a constitutional duty on the part of state officials to explore and provide the least stringent practicable alternatives to confinement of noncriminals." The Welsh court, itself, concluded that the Due Process Clause of the United States Constitution required officials to make "good faith attempts to place (involuntary patients) in settings that will be suitable and appropriate to their mental and physical condition while least restrictive of their liberties." A recent consent decree in Massachusetts on behalf of the residents of a state hospital (Northampton) for the mentally ill, Brewster v. Dukakis (1979), strongly embodies these principles.

Another line of cases which constitutes a direct antecedent to the LRE requirement of P.L. 94-142 are those cases striking down state-sanctioned racial segregation of public schools. Again, as in the cases

previously discussed, rigid and unnecessary segregation based upon irrational considerations was found to be inherently offensive to the Constitution. In its often-quoted holding in the case of Brown v. Board of Education, the Supreme Court said:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

This case and its progeny provided a major impetus for the incorporation of the LRE requirement in both P.L. 93-380 and P.L. 94-142.

In the early 1970s these lines of cases, articulating in different contexts and varying language the right to habilitation, treatment and education in the "least restrictive," most "normal" setting, culminated in the now famous landmark special education cases in Pennsylvania (Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania), the District of Columbia (Mills v. Board of Education of the District of Columbia), and Louisiana (Lebanks v. Spears). These cases applied the principles of "least restrictive setting" and "desegregation" to the special education context. Because the system of special education is premised on differential treatment of persons with very different needs, this application took the form of a "presumption" or preference rather than a complete prohibition as in the cases involving institutionalized persons and persons segregated on the basis of race.

Thus, in the Pennsylvania case the court said:

> It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in special public school classes is preferable to placement in any other type of program of education and training.

In a more abbreviated version of this statement, the Mills decision in the District of Columbia declared that:

> Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

Similarly, in the Lebanks decision in Louisiana, it was ordered that:

> All evaluations and educational plans, hearings and determinations of appropriate programs of education and training hereinafter provided for shall be made in the context of a presumption that, among alternative programs and plans, placement in regular education public school class with the appropriate support services is preferable to placement in a community training facility and placement in a community training facility is preferable to placement in a residential institution or other program of education outside the Orleans Parish public schools.

These judicial declarations of the presumption in favor of the least restrictive environment for the education and training of handicapped children are reflected in the requirements of P.L. 94-142 and its regulations.

II. The LRE Requirement of P.L. 94-142 and Its Regulations

A. Definition of the Requirement

P.L. 94-142 provides generally in 612(5)(B) (20 U.S.C. 1412(5)(B)) that each state shall establish:

> procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily....

P.L. 94-142 further provides that local educational agencies and intermediate educational units applying for funds under the act shall:

> establish a goal of providing full educational opportunities to all handicapped children, including ... (iv) to the maximum extent practicable and consistent with the provisions of section 612(5)(B) (LRE requirement), the provision of special services to enable such children to participate in regular education programs; .... (20 U.S.C. 1414(a)(1)(C)(iv)).

These provisions of P.L. 94-142 are further defined in the regulations, principally in 121a.550-556. Section 550 is virtually an exact repetition of the LRE requirement in P.L. 94-142, itself, except for the part of the introductory sentence which requires "each state educational agency" to "insure that each public agency establishes and implements procedures which meet the requirements of 121a.550-121a.556."

Section 551 requires "public agencies" to insure that a "continuum of alternative placements is available to meet the needs of handicapped children for special education and related services." The "alternative placements" referred to are further defined as those included within the definition of "special education" in 121a.14, which is "specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child" and which includes "classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." In addition, paragraph (b)(2) of 121a.551 includes in the "continuum" "supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement."

Section 121a.552 sets forth a series of additional requirements concerning the placement of handicapped children. In particular, each public agency must insure that such placement is determined at least annually, is based on the child's individualized education program and is as close as possible to the child's home. Furthermore, paragraph (b) emphasizes the requirement of a "continuum of alternative placements" specified in the previous section by requiring that these placements be "available to the extent necessary to implement the individualized education program for each handicapped child." Paragraph (c) emphasizes the mainstreaming goal of the law by requiring public agencies to insure that "unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped." Paragraph (d), on the other hand, emphasizes the neutrality of the law relative to placement by requiring public agencies to insure that "in selecting the least restrictive environment, consideration is given to any harmful effect on

the child or on the quality of services which he or she needs." The note to this section emphasizes two additional factors: disruption of the regular classroom, making it an inappropriate placement, and distance from home, which is also specified in subparagraph (3) of paragraph a. In general, the entire section and the note which follows stress the basic rule that placement decisions must be made on an individual basis, although where appropriate, placements should be as close to home as possible and in the most "normal" school setting.

Section 121a.553 addresses itself to integration of handicapped children with non-handicapped children in various non-academic activities "including meals, recess periods, and the services and activities set forth in 121a.306. Section 121a.306 requires access to these services and activities by handicapped children which is equal to the access enjoyed by non-handicapped children. It also lists more completely what those services and activities are:

> Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

Section 121a.554 provides that the LRE requirement shall apply to children in public and private institutions as well as to children in other settings. Thus, each public agency and institution in the state is subject to the LRE requirement and presumably must make provisions for its children to be with non-handicapped children to the maximum extent appropriate. Sections 121a.554 and 555 provide for technical assistance, training and monitoring activities and thus, do not contain any additional provisions defining the substance of the LRE requirement.

B. Analysis of the LRE Requirement

As indicated in the previous section on the historical basis of the LRE requirement, the landmark special education cases established a "presumption" in favor of the most "normal" educational placement. The LRE requirement specified in P.L. 94-142 and its regulations does not use

the term "presumption" and leaves unclear whether, in fact, a presumption has been created. The LRE requirement clearly states a preference that "to the maximum extent appropriate, handicapped children (should be) educated with children who are not handicapped."

In legal terms, however, the difference between a preference and a presumption can be very significant. In the case of a presumption, the burden of proof generally shifts to the party against whom the presumption is operating -- in this case, the party proposing the more restrictive placement. Such party then has the legal obligation of rebutting the presumption, i.e., demonstrating in this particular case, that the presumption is outweighed by other considerations, such as the severity of the child's needs. In the case of a preference, the legal requirements are generally less onerous and the preference becomes one of many factors to be weighed by the decision-maker and not necessarily a factor whose rejection requires a clear and compelling rationale.

In summary, where a presumption is operating, a decision-maker whose ruling is contrary to the presumption must explain why the presumption has not been followed in the placement decision; where a preference exists, such explanation is generally unnecessary. Hence, from a decision-maker's perspective, it becomes important to determine whether the goal of LRE as stated in P.L. 94-142 and its regulations creates a presumption or a mere preference. The importance of this distinction will be more apparent in the analysis which follows of the approach to the LRE requirement of judges and hearing officers.

Another issue confronting judges and hearing officers faced with the LRE requirement is how to determine when the LRE requirement is in conflict with the principal placement criterion contained in P.L. 94-142 and its regulations -- an appropriate education. Whether the LRE requirement is a "presumption" or a "preference," a judge or hearing officer making a placement decision must decide how much weight the requirement should have relative to other considerations such as the severity of the child's handicap, the potentially harmful effects on the child in being placed in the least restrictive environment and the potentially harmful effects of such placement on other children in the proposed placement.

The need to balance these considerations is reflected in the way the requirement is written. On the one hand, the requirement is qualified by potential limiting phrases such as "the maximum extent appropriate," "the nature and severity of the handicap," "a handicapped child's individualized education program" and "potential harmful effect on the child or on the quality of services which he or she needs." On the other hand, the requirement is buttressed by phrases such as "the maximum extent appropriate" (this phrase can be interpreted either as a limitation or a maximum mandate), "removal . . . from the regular education environment . . . only when the severity of the handicap is such that . . .", "placement . . . as close as possible to the child's home" and "unless a handicapped child's program requires some other arrangement . . . ." Thus, a judge or hearing officer making a placement decision must engage in a delicate weighing of opposing considerations and ultimately must decide how much weight the LRE requirement should be given in a particular case or in general.

Another issue raised by the LRE requirement is how to decide when a particular placement is more or less restrictive than another placement where one is in a private school and the other in a public school or other public facility. It seems relatively clear from the regulations that a regular education placement is the least restrictive placement possible and that as the degree of special education services increases, as measured by increased time away from non-handicapped peers, the placement becomes more restrictive. It also seems clear that placements at home, in hospitals and in "institutions" are more restrictive than placements in public school special classes. The problem arises when one compares public and private placements. Are all private placements considered placements in "institutions"? What is an "institution"? Are private placements per se more restrictive than public placements? For example, is placement in a private school which has a majority of non-handicapped students more restrictive than placement in a public school where the private school placement is in a regular class with special education support services and placement in the public school is in a special education self-contained class?

Another issue faced by judges and hearing officers implementing the LRE requirement is suggested by paragraph (b) of 121a.552 which appears to be an attempt to insure that the "continuum of alternative placements" required by the preceding section is actually available "to the extent necessary to implement the individualized education program for each handicapped child." The issue involved here is the extent to which a decision-maker should try to determine whether a placement being offered is actually available as it is described in an individualized education program. For example, should a hearing officer or judge consider evidence that parts of the placement are unavailable? What weight should be given to a local education agency's assurance that the program will be available when needed, even though it is not available at the time of the hearing? How much weight should a hearing officer give to evidence of past failure of the local education agency to provide promised services?

A related issue concerns the weight to be given to evidence that a child has made inadequate progress or has regressed over a period of time in an educational program. For example, should the "least restrictive environment" be ordered, even though there is evidence that that particular placement or one similar to it has been ineffective in meeting the needs of the child? How much modification of the program should be required before it may be considered appropriate? To what extent and in what circumstances should past failure of a program to meet a child's needs be considered as evidence that a particular local educational agency or private school is unable to develop an appropriate program? Conversely, to what extent should the success of a child in a program be considered in a placement decision where that program is more restrictive than that being offered by the local educational agency?

These last two issues could be classified as "reality issues." That is, issues concerning the extent to which hearing officers should look beyond and through all of the "paper" which is submitted by the parties to determine what the proposed programs are actually like and what their likely impact will be on the child, based, in part, on what the child's experience has been in an existing program.

Another issue relating to the requirement of a "continuum of alternative placements" is the extent to which decision-makers should require school systems to present evidence that alternative, less restrictive placements have been explored prior to the recommendation of the proposed placement contained in the individualized education program. The mere fact that a particular placement is being proposed provides no assurance that other less restrictive alternatives have been explored. In a similar vein is the issue of the extent to which hearing officers should require and include in their decisions proposals for future movement of a child to a less restrictive setting. If the LRE requirement is to be properly implemented, a child's placement should not be perceived as static, to be reviewed and routinely approved on an annual basis.

A final issue which should be raised before proceeding to an analysis of the placement decisions is the extent to which the student's preference should be considered in determining the placement. This issue is particularly important where the student has reached the age of majority or even where a student has reached the maximum age for compulsory school attendance. Since the "least restrictive environment" requirement is primarily a civil rights provision designed to protect students from undue segregation, should the student's view of which placement is more or less "restrictive" be accorded substantial weight? For example, if a student with severe emotional problems feels more comfortable in a private school for emotionally disturbed children than in a public school special class because he or she feels that the public school setting is more "restrictive" in a psychological sense, should this preference be seriously considered? Conversely, should such a student have the right to be heard separately from the parents where a more restrictive placement, such as a residential school, is being considered? In fact, such a situation is not very different from a "civil commitment proceeding" against a person who is deemed to be so mentally ill as to possibly require a "residential placement."

These are some of the principal issues which must be addressed by judges and hearing officers as they apply the LRE requirement to specific

cases. The following section will analyze how these and other issues are addressed in judicial and administrative decisions.

III. Implementation of the LRE Requirement by Judges and Hearing Officers

A. Introduction

To address the question of how the LRE requirement is being implemented by judges and hearing officers, this section of the report will review and analyze a collection of court decisions decided under P.L. 94-142 and a sample of hearing officer decisions from nine selected states. Before beginning this review and analysis, it would be useful to describe the system in which these court and administrative agency decisions are issued (see the diagram entitled "Administrative and Judicial Review Under P.L. 94-142").

The "due process" requirements of P.L. 94-142 and its regulations provide that "a parent or public educational agency may initiate a hearing" on a variety of matters, including a proposal (in the form of an individualized education program) of a public agency to initiate or modify an educational placement of a handicapped child. This provision entitles a parent to "an impartial due process hearing" which is defined in the regulations as a formal administrative hearing with the parties entitled to many of the rights to which they would be entitled in a court proceeding, including the right to an impartial hearing officer, to be represented by an attorney, to present evidence, to confront, cross-examine and compel the attendance of witnesses and so forth (for a complete statement of these rights, see 121a.506-121a.508).

The result of this hearing is a decision by the hearing officer on the issues which are being disputed. P.L. 94-142 and its regulations provide that this hearing may take place either at the local or state level. If it takes place at the local level, the state must provide for a subsequent level of administrative review at the state level. If the hearing is held at the state level, the state may provide for another level of administrative review, but this is not required. Similarly, the state may add various features to its appeals process, such as a

mediation option preceding the due process hearing. Ultimately, in either type of hearing system, a further appeal from the highest administrative decision is available to a state or federal court, at the option of the party appealing.

This appeal to the courts is to the lowest court of "general jurisdiction" which, in the case of the state courts, is the main trial court (which has different names in different states, such as "superior court", "supreme court", "supreme bench", etc.) and, in the case of the federal courts, is the federal district court (unlike the state courts, this is uniform throughout the country). After this court (state or federal) issues its decision, subsequent appeals are possible, in the case of the states, to the highest court of the state, usually through an intermediate appellate court and, in the case of the federal courts, to the federal court of appeals for the circuit in which the district court is located. Ultimately, both state and federal appeals can be appealed further to the United States Supreme Court which has the discretion to accept or refuse to accept the case.

Another way for cases under P.L. 94-142 and its regulations to reach the courts is if a party proceeds directly to the court of general jurisdiction for a declaration of rights (i.e., an interpretation of state or federal law) or an injunction (as in an enforcement proceeding) or both. This happens when the issue is one which is not suitable for the normal administrative process described above because the issue is too urgent to wait for the appeals process to run its course, such as in the case of an expulsion of a handicapped child from school for disciplinary reasons; or where the issue which is raised requires a resolution which is beyond the normal authority of a hearing officer, such as non-compliance by a local educational agency with one or more major provisions of the law; or in other situations where the magnitude of the issue requires resolution by a higher authority, i.e., a court.

In summary, P.L. 94-142 requires the states to have one or two administrative decision points as part of their due process systems -- one if the "due process hearing" is at the state level and two if the

"due process hearing" is at the local level. This is a minimum requirement to which the states may add by using such procedures as mediation. Court decisions under P.L. 94-142 arise in one of two ways, either as the result of an appeal from the highest administrative decision point or as the result of a direct proceeding seeking an interpretation of the law or an injunction, or both.

B. Relationship of Court Decisions Under P.L. 94-142 to the Implementation of the LRE Requirement

1. Introduction and Methodology

This section will review court decisions which have arisen under P.L. 94-142 (or closely analogous state statutes such as Chapter 766 of the Acts of 1972 in Massachusetts), and analyze the relationship of these decisions to the implementation of the LRE requirement. Virtually all of these decisions have resulted from cases filed directly in the lowest state or federal court of "general jurisdiction" rather than cases which have arisen through the administrative appeals process. This is for three principal reasons. First, when a major new civil rights act such as P.L. 94-142 becomes law, the initial wave of court cases tends to focus primarily on interpreting and enforcing the provisions of the new law. As indicated in the previous section, issues of interpretation and enforcement generally are not appropriate for decision through the administrative process (although there are exceptions to this broad statement). Thus, these cases tend to go directly to court.

The second reason is that the administrative process is a lengthy one which can range from six months to two years, measured from the time an individualized education program is rejected by a parent. Since P.L. 94-142 has been in effect in part since September 1, 1977 and fully since September 1, 1978, there has been insufficient time for many administrative decisions to reach the courts through the appeals process and to be decided.

A third reason is that, in general, and not only in the area of special education, only a small proportion of administrative appeals reaches the court level. Of this small fraction, very few of the cases

result in a court decision since most are settled by agreement between the parties. Of those cases which are decided by the courts, most are affirmed in a summary fashion with a one- or two-paragraph opinion, and few result in a full-blown decision. Thus, for example, in Massachusetts where appeals statistics have been kept on a special education law similar to P.L. 94-142, of 1,200 appeals from September 1974 through June 1977, only 53 cases, or approximately 4%, have been appealed to the state court of general jurisdiction from the highest administrative level. Of these 53 cases, only 4 resulted in lengthy decisions, with another 10 or so resulting in a one- or two-paragraph affirmance, and with the remainder in the process of settlement and unlikely ever to be decided by the courts.

The court decisions which are reviewed in this section include both published (by a standard publishing system such as that operated by West Publishing Company) and unpublished cases. These cases were located through a variety of techniques including a search of state "annotated" statute books for all of the states ("annotated" means that the state statute, such as the special education law, is followed by a summary of all reported court decisions which have interpreted the statute), a search of the relevant West "Digests" of cases which are organized by subject matter, a search of periodicals in the areas of law and education, and public policy and education, such as the "Education Law Bulletin" published by the Center on Law and Education in Cambridge, Massachusetts, solicitation of court decisions from the nine states which participated in the study of administrative decisions (which follows in the next section), and word of mouth.

Since it is rare for decisions of the lowest court of general jurisdiction in a state to be published, these were particularly difficult to acquire. In addition, many federal district court decisions are unpublished and these were also difficult to locate. In general, however, the cases which are analyzed in this section represent a good sample of the major issues which are being litigated under P.L. 94-142.

One final note on the court decisions. Although court decisions of one state or geographic area within a state are frequently referred to

for guidance by courts of other states or other geographic areas within the same state, the decisions, as a technical matter of law, are binding only in the geographical jurisdiction of the court which issued the decision and only on the parties to the dispute. Nevertheless, many cases, although not technically binding as precedent, are given great weight, particularly by judges in the same state, but also by judges in other states.

2. Overview of the Court Decisions

For purposes of analysis, the court decisions have been grouped into six general categories: (1) major enforcement cases, each raising a number of basic issues of implementation of significance to large numbers of children; (2) cases challenging the suspension and expulsion of handicapped children from public school; (3) cases raising various issues relating to private school placements; (4) cases concerning participation in athletics by handicapped students; (5) cases challenging the failure of states to use "impartial hearing officers"; and (6) individual appeals from the decisions of hearing officers. Each of the cases in these categories will be discussed and their relationship to the implementation of the LRE requirement will be explored.

a. Major Enforcement Cases

The major enforcement cases are very much akin to the landmark "right to education cases" such as PARC, Mills and Lebanks v. Spears, which preceded P.L. 94-142 and were a major impetus to its enactment. The principal difference between the two lines of cases is that the pre-94-142 cases were based on the provisions of the United States Constitution, while the enforcement cases are based primarily on the mandate of P.L. 94-142, itself (it should be noted that some of the enforcement cases were filed before P.L. 94-142 became effective and were then based primarily on constitutional or state law provisions, but now rely on P.L. 94-142 as their primary authority).

The best example of these enforcement cases is the recent consent decree in Mattie T., et al. v. Holladay, et al. (Civil Action No. DC-75-31-S), approved by the Federal District Court for the Northern

District of Mississippi on January 26, 1979. This Consent Decree (which is an agreement by the parties to settle the case without a formal court decision) settled a class action filed on April 25, 1975 "on behalf of all school age children in the state of Mississippi who are handicapped or regarded by their schools as handicapped." The class action challenged the following alleged practices:

> (a) the denial of special education services to handicapped children who have either been excluded from school entirely, placed in inappropriate "special education" programs, or neglected in regular classes, (b) the provision of segregated and isolated 'special education' programs, (c) the use of racially and culturally discriminatory procedures in the identification, evaluation and educational placement of handicapped and allegedly handicapped children, and (d) the absence of procedural safeguards to review decisions of school officials regarding the identification, evaluation, and educational placement of those children.

The consent decree addressed all of these allegations in elaborate detail, setting forth a blueprint for compliance with P.L. 94-142.

This consent decree is of general relevance to the implementation of the LRE requirement because the LRE requirement is obviously rendered meaningless if placement decisions are made in a manner which violates all of the procedural and substantive rules of P.L. 94-142 and ultimately is totally irrational and discriminatory. It would be impossible for the requirement to be applied with any degree of compliance in this situation.

The consent decree is of specific relevance to the implementation of the LRE requirement because it contains a major section entitled "Least Restrictive Environment." This section mandates a system for handicapped children in "institutions" to be educated by local school districts, to have "surrogate parents" assigned where appropriate and, in general, to be placed in the least restrictive environment. Also, the state Department of Education is required to "collect information sufficient to determine whether each local school district is placing its handicapped children in the least restrictive environment." In addition, the Department of Education is required to initiate detailed enforcement procedures where it has reason to believe that children are not being placed in the least restrictive environment. The criteria for

determining when a local educational agency is violating the LRE requirement are set forth in detail and generally prohibit segregation of handicapped children, except when the individualized education program specifies that greater integration is not "appropriate."

A California complaint filed on February 14, 1977 in the United States District Court for the Northern District of California raises similar issues. In California Association for the Retarded v. Wilson Riles, a class action was filed on behalf of two major groups of children: (1) handicapped children in segregated public school settings who could be educated to a greater degree with non-handicapped children, if they were provided with appropriate "supplementary aids and services"; and (2) handicapped children in regular education programs who are having educational and personal difficulty in such programs because they are not being provided with appropriate "supplementary aids and services." Both classes of plaintiffs also allege a denial of "due process" in the decision-making process which led to their placements. This case has not yet been resolved and is still pending before the court.

As in the case of Mattie T., the significance of this case to the implementation of the LRE requirement is that it focuses on broad systemic abuses, such as the lack of "supplementary aids and services," which eliminates regular class placement options for handicapped children by making it impossible for them to survive educationally in the regular class setting. Obviously, these threshhold questions relating to the existence and availability of services must be resolved before implementation of the LRE requirement is possible.

Similar broad enforcement cases which focus less specifically on the LRE requirement than Mattie T. and California Association for the Retarded are Allen v. McDonough (Superior Court Civil Action No. 14948), filed in Massachusetts on June 10, 1976, which challenges the failure of the School Committee of the City of Boston, on a timely basis, to evaluate, place and review the placements of handicapped children. Ultimately, the court found the Boston School Committee to be in contempt of court for failing to carry out the terms of a consent decree and currently, the court maintains continuing jurisdiction over the case;

Lora v. New York Board of Education (46 L.W. 2683), where a Federal District Court for the Eastern District of New York ruled on June 2, 1978 that New York's system for educating "emotionally disabled" handicapped children in special day schools for the emotionally disabled violated a wide range of due process and other rights of the children placed in those schools, including the right not to be discriminated against on the basis of race. In the course of its extensive decision, the court ordered a total revamping of all of the procedural and programmatic requirements including reviews of placements and "bias free approaches to mainstreaming"; and In The Matter of Reid, et al. (No. 9499, New York State Education Department, Order of the Commissioner of Education), which is a case similar to Allen v. McDonough cited above, applying only to New York City, where a plan was ordered "to eliminate delays and waiting lists in the diagnosis and placement of children with handicapping conditions.

Other actions where basic rights of handicapped children to an appropriate placement are raised are P-1 v. Shedd (Civil Action No. H78-58), a class action filed in the Federal District Court of Connecticut and settled recently by a consent decree, and Laura M. v. Special School District No. 1 (Civil Action No. 4-79-123), an action in the Federal District Court for the District of Minnesota (Fourth Division) which is still pending. In both cases, lack of appropriate evaluation and placement procedures, special education programs and due process procedures are alleged.

As in the case of Mattie T. and California Association for the Retarded, all of these broad scale enforcement cases raise issues whose resolution is a necessary condition for the proper implementation of the LRE requirement. Unlike Mattie T. and California Association for the Retarded, they do not focus as strongly on the LRE requirement itself but, instead, emphasize the basic requirements of P.L. 94-142 in the areas of evaluation, placement, program provision and procedural due process.

b. Cases Challenging the Suspension and Expulsion of Handicapped Children From Public School

The leading case on the issue of expulsion of handicapped children from public school is Stuart v. Nappi (Civil No. B-77-381), decided by the Federal District Court for the District of Connecticut on January 9, 1978. In this decision, the court granted a motion for an injunction against the holding of an expulsion hearing concerning a handicapped teenager ruling that an expulsion amounts to a "change in placement" within the meaning of P.L. 94-142 and that, therefore, the due process, placement and other requirements of that law have to be observed. In response to the plaintiff's claim that her expulsion would violate the LRE requirement of P.L. 94-142, the court said:

> The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children. An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment.

In two other cases where a similar issue was raised, the parties entered into a "stipulated agreement" that the plaintiffs be reinstated in school and provided with an appropriate program (K.B. v. Withey, 78-288, Federal District Court for the District of Vermont, and Kenneth J. v. Kline (Civil Action No. 77-2257), Federal District Court for the Eastern District of Pennsylvania). In the latter case, the "Stipulation Between the Parties" specifically stated that "an exclusion . . . of an emotionally disturbed or brain damaged/learning disabled school age child (who is now receiving or in need of special education) constitutes a 'change in educational status' as, defined (in the Pennsylvania special education law)."

In another case, Howard S. v. Friendswood Independent School District, 454 F. Supp. 634, decided on June 23, 1978 by the Federal District Court for the Southern District of Texas, the court ordered reinstatement in public school of a handicapped student and also ordered

reimbursement to the parents for private school placement since the time of the expulsion. In finding for the plaintiffs, the court found that the initial problem arose because the assistant principal treated the problems arising from the student's handicap "as discipline problems and not special education problems and failed to notify the special education department of Douglas' difficulties in adjusting to high school."

A similar result was reached in the case of In re Thomas K. v. Southeast Warren Community School, where the Iowa State Superintendent of Public Instruction ordered a school district to "cease their efforts to have Thomas K. expelled from school to the extent that he would be totally precluded from obtaining educational services provided by the District which are appropriate for his needs under the circumstances." This decision, issued on July 13, 1978 (1 D.P.I. App. Dec. 231), found the requirements of P.L. 94-142 to supercede formerly existing policies on expulsion of students from public school.

The relationship of all of these decisions to the implementation of the LRE requirement was best stated by the court in Stuart v. Nappi: "the right to an education in the least restrictive environmnt may be circumvented if schools are permitted to expel handicapped children." If policies on expulsion are permitted to be superior to the requirements of P.L. 94-142, some students would be denied any educational opportunity while others might be denied an appropriate educational opportunity by not having the right to attend the public school programs on the "continuum of alternative placements." For both categories of students the LRE requirement would be effectively undermined.

c. Cases Relating to Private Placements

Another group of cases which has had a direct impact on the availability of the "continuum of alternative placements" are the cases raising the issue in different contexts of the responsibility of public schools for private school placements. There are five subcategories of these cases which will be discussed below.

1. Cases Involving the Issue of Limitations on Total Tuition Payments for Children in Private School Placements

The leading case in this area is Elliot v. Board of Education of the City of Chicago, Illinois (No. 63062), a class action decided on September 13, 1978 by the Illinois Appellate Court, First District, in which the court held that an Illinois law which set a limit of $2,500 on the contribution of a local educational agency to the cost of an "institutional" day or residential placement violates the Illinois constitution. The court said:

> It is our opinion that the legislature has established the education of handicapped students as part of the responsibility of the public school system. Furthermore, the education of handicapped students in private special education facilities pursuant to section 14-7.02 of The School Code is also a program established as part of the public school system. So established, such education must be free of tuition charges for Illinois residents through the secondary level.

Another court reached substantially the same result in construing a Florida statute which required local school districts to "establish a maximum amount which can be paid by a district school board for an individual exceptional student contract with a nonpublic school board on the maximum full-time equivalent earned by the student." The school board involved in the case "interpreted this to mean that they could only pay out to private schools what they actually received from the state for that particular student." The Florida Supreme Court, in Scavella v. The School Board of Dade County and the Florida Department of Education (Case no. 50,831), ruled on September 28, 1978 that this interpretation was incorrect as applied to those cases because it required parents to pay for a portion of a school district recommended program. The court said:

> We therefore hold that the statute requires the school districts to establish a maximum amount that would not deprive any student of a right to a free education. So interpreted the statute is constitutional and will not deny anyone of equal protection before the law since the cap is reasonably based on the student's particular need. Whether appellants' rights to a free education are denied depends on whether there exists some adequate program for the exceptional student, which cost does not exceed the cap established by the school board.

The relevance of both of these decisions to the LRE requirement is that they both require that the full "continuum of alternative

placements" be made available on a comparable basis, i.e., without any cost to the parent. This finding allows the LRE requirement to be applied in a neutral manner, without any built-in bias for or against private school placements. This conclusion recognizes that although these placements are among the most restrictive on the "continuum," they are appropriate in some cases and must be an equal part of that continuum. Thus, private school placements may be made when they are the least restrictive, appropriate placements, without any added burden on the families involved or incentive to the school districts.

2. Cases Involving Charges to Parents for Institutional Placements

A closely related line of cases to those just discussed are those which do not involve a cap on school district payments but do raise the issue of parent contributions to the costs of institutional placements. The leading case here, Michael P. v. Mahoney (Civil Action No. 78-545), was settled by a Consent Decree approved by the United States District Court for the District of Connecticut on March 19, 1979. The Decree resulted in the elimination of a policy of the state Department of Children and Youth Services which required the plaintiff parents to contribute to the cost of residential special education through a system of "contribution contracts." The case was brought as a class action.

A case raising a similar issue, Jenkins v. State of Florida, is currently pending in the United States District Court for the Middle District of Florida. In Jenkins, maintenance fees charged by the State of Florida to parents of handicapped children in state residential facilities are alleged to violate P.L. 94-142 among other provisions.

As with the cases involving a cap on local school district contributions to private school placements, these cases relate to the LRE requirement because of the potential bias against residential placements created by the parent contribution requirement. If allowed to exist, this bias would skew placement decisions in favor or against residential placement, depending on the financial impact on the school system. This would violate the purpose of the LRE requirement which is premised on the equal availability of the full "continuum of alternative placements."

3. Cases Raising the Issue of Retroactive Reimbursements for Private School Placements

The leading case here is Amherst-Pelham Regional School Committee v. Department of Education (SJC 1217), decided by the highest court of Massachusetts on September 28, 1978. In this decision, the court ruled that parents were entitled to retroactive reimbursement for a private school placement made by the parents following their rejection of an individualized education program, so long as they ultimately prevailed and the specific school in which they placed their child was the school ordered as the appropriate placement. A case in which a similar decision was rendered, based on the decision that the school district left the parents no choice other than to place their child in a private school, was Gargani v. The School Committee of Cranston (C.A. No. 77-8612) decided by the Federal District Court for the District of Rhode Island on May 4, 1978.

The importance of these cases, and particularly of the Amherst-Pelham case, is that the general bias against private placements, which appears to characterize the attitude of some local education agencies, is balanced and neutralized by the parental right unilaterally to make a private placement despite local opposition and to be reimbursed later if the parent is proved to be correct. As in the case of the other decisions on private school placements discussed in this section, those decisions have the effect of maintaining the neutrality of private day and residential placements on the total "continuum of alternative placements."

4. Other Cases Relating to Private School Placements

Three other cases should be mentioned as part of this review of cases affecting private school placements. The first two concern the issue of agency responsibility for payment where there is a dispute between two or more agencies. In Ruble v. Bevilaqua (No. 78-1335), the United States Court of Appeals for the First Circuit decided on November 2, 1978 that the Rhode Island Department of Mental Health, Retardation and Hospitals could not be held responsible for residential placements of "emotionally disturbed children" beyond its annual appropriation by the Rhode Island legislature. The implication of the decision was that, absent any other

funding source, the local educational agency should be responsible for the funding of the placement of the plaintiff.

In the second case, North v. District of Columbia Board of Education (C.A. No. 79-0127), the Federal District Court for the District of Columbia decided on April 9, 1979 that the local educational agency should be responsible for the full costs of a residential placement of a multiply-handicapped child despite arguments that the residential part of the placement was not educationally related. The court said:

> It is unfortunate that the two agencies of the District having responsibility for plaintiff's care are seeking to shift the responsibility to each other -- the Board of Education claiming that plaintiff's problems are emotional, and the Department of Human Resources asserting that they are educational and further that it will not undertake to tend to his treatment without a formal finding that the parents have neglected him. It may be that the fault lies with the antiquated state of the District of Columbia laws; but, in any event, it is unfortunate that the assistance of this court had to be invoked under federal statutes to resolve what essentially are internal bureaucratic disputes.

Both Ruble and North are relevant to the implementation of the LRE requirement because the issue of agency responsibility will affect the actual availability of some day, residential and hospital placements, at least temporarily, until the disputes can be resolved. Again, as in the other cases affecting day and residential placements, the unavailability of certain placements will skew the placement decision by distorting the "continuum of alternative placements" contemplated by P.L. 94-142. If appropriate placements in the least restrictive environment are to be made, all placement options on the "continuum" must be available on an equal basis.

A third case which should be mentioned in this section is a pending case in the Federal District Court for the District of Pennsylvania, Armstrong v. Kline (C.A. No. 78-172), in which a class action complaint was filed on January 17, 1978 on behalf of severely handicapped school-aged children in Pennsylvania who require or may require 12-month continuous special education and related services. Again at issue from the perspective of the LRE requirement is the availability of the

full "continuum of alternative placements," including services on a 12-month basis, when appropriate to the needs of a particular child.

d. Participation in Athletics by Handicapped Students

Two cases should be noted in this area. In Kampmeier v. Harris, 403 N.Y.S.2d 638, decided by a New York Court of general jurisdiction on February 17, 1978, the court held that a school could not exclude a student from participation in all contact sports without following the procedures of P.L. 94-142 and finding her to be handicapped and in need of special education following an evaluation. In the meantime, the court ordered that she be allowed to participate. In a similar case, Doe v. Marshall, 459 F. Supp. 1190, decided by the Federal District Court for the Southern District of Texas in 1978, the court ruled in favor of an "emotionally disturbed" student who wanted to play football. Both of these cases are significant from the perspective of the LRE requirement because they affect the right of handicapped children to interact with non-handicapped children in non-academic areas (see 121a.553).

e. Failure to Use "Impartial Hearing Officers"

Two cases should be mentioned here -- one which has been decided in Connecticut and the other which is pending in Minnesota. In the Connecticut case, Campochiaro v. Califano (Civil No. 78-64), the Federal District Court for the District of Connecticut ruled on May 18, 1978 that the use of local school board members as hearing officers and the use of state employees as a review panel both violated P.L. 94-142, which prohibits employees (including unpaid board of education members) from serving as hearing officers. In the Minnesota case, Laura M. (mentioned in subsection a of this section), the plaintiffs are challenging Minnesota's system of having the state hearing officer's decision subject to the approval of the state Commissioner of Education, arguing that the hearing officer's opinion is final unless appealed. Both of these cases are relevant to the LRE requirement in a general way because they affect the integrity of the decision-making process. Obviously, decisions about placements should not be made by persons whose employment prevents them from being totally objective and places them in a potential conflict of interest situation.

f. Individual Appeals From the Decision of Hearing Officers

These cases are presented separately not because they raise different issues from those discussed in other parts of this section, but because they will hopefully shed some light on what the role of the courts will be in reviewing placement decisions which are appealed following the conclusion of the administrative process. Six cases will be presented: one from Maryland, one from Georgia and four from Massachusetts.

The Maryland case, Roles v. Maryland State Department of Education Hearing Review Board (Law No. 67,820), was decided by the Circuit Court for Prince George's County on August 18, 1978. Briefly, the parents wanted their daughter to continue in a private school placement where she had been for the past three school years. The school district was offering a public school program in a special day school for handicapped children operated by the school district. The court decided that its scope of review was limited to two issues of law: the constitutionality of the statutes and regulations in question and the adequacy of the evidence on which the State Review Board based its decision. The court responded in the following manner to the issue posed by the petitioners of what should be the scope of review by the court:

> Whether the applicable standard of review is substantiality of the evidence, against the weight of the evidence, or arbitrary and capricious administrative action, judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached . . . . It is not the proper role of the court to substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken.

The court then reviewed the evidence and found the decision of the State Review Board to be supported by substantial evidence and not to be "arbitrary and capricious." The court did not address the issue of the least restrictive environment but relied solely on the standard of appropriateness, finding that the program offered by the school district was appropriate.

In the Georgia case, John A. v. Hinson (C.A. No. 78-1717A), the Federal District Court for the Northern District of Georgia, on

December 20, 1978, decided the appeal of a student whose parent wanted him placed in a residential school. The school district offered a "self-contained special learning disabilities/behavior disorders class at a public school." In specifying the standard of review, the court said:

> The burden is on plaintiff to demonstrate by a preponderance of the evidence that he has been denied a free appropriate public education. As noted by the DeKalb defendants, plaintiff's burden grows even more onerous when he argues, as here, that residential schooling is necessary as such a placement is seldom the "least restrictive environment," 45 C.F.R. 121a.55a, or supportive of the "mainstreaming" policies underlying the legislation. The evidence to be considered by the court is the testimony and exhibits proferred at trial, supplemented after trial, and offered at the administrative hearing.

The court then reviewed the evidence in a summary manner and affirmed the hearing officer, noting that "appropriate" shall not be read as "best" or "exclusive" but rather as "suited to the individual child's needs."

In Isgur v. Mandell (No. 76-3393, May 4, 1978), the Massachusetts Superior Court upheld the decision of the hearing officer that a public school special education program with most of the child's time spent in regular education was appropriate. The parents' preference for a private day school program was rejected. The court specified the following standard of review:

> . . . the court's proper role is not to take evidence afresh and decide for itself . . . but is rather to decide whether the board's decision was supported by the facts before it and was legally justified . . . if the agency finding is set aside the court should order an educational placement only if an appropriate and adequate plan appears on the record. (Otherwise, the case should be remanded to the agency.)

The court did not discuss the LRE requirement in its decision.

In LeDrew v. Anrig (No. 77-3531, May 2, 1978), the Massachusetts Superior Court reversed the decision of a hearing officer and ordered the plaintiff placed in a private day school, the choice of the parents. The school district had offered a substantially separate special education program in a public school. The court adopted the same standard of review set forth in the Isgur case, cited above. The court then found

that the decision of the hearing officer should be reversed because it was "unsupported by substantial evidence on the record." The court said further that "there is simply insufficient evidence to support the hearing officer's conclusion that the school was prepared, i.e., willing and able, to provide an adequate and appropriate program for Mark LeDrew."

Among the court's findings were that "the hearing officer's conclusion appears to be based on the conclusory testimony of (the LEA representative)", that the child "had attended public school since grade one and his educational needs had not been met with any great success," and that the LEA was not "trying in good faith to meet the child's educational needs as expeditiously as possible." The court then ordered the private school placement, making the following comment about the LRE requirement:

> The court is cognizant of the strong policy adopted by the Department of Education which requires that the child's placement be in the least restrictive one which can also meet his or her needs. However, since the only educational plan which appears on the record to be adequate and appropriate to meet the needs of Mark LeDrew is the placement at the Carroll School (private day school), that placement could also rightly be considered the least restrictive.

In Town of Lexington v. Bureau of Special Education Appeals (No. 76-2449, October 5, 1977), a local educational agency appealed the decision of a hearing officer ordering the placement of a child in a private day school. The local educational agency had offered a public school program. The court adopted the same basic standard of review as that in Isgur and LeDrew: "whether within the record which was before the administrative agency and which has been sent to the court for review, there is such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." The court then concluded that "there is substantial evidence to support the Bureau's findings." The court also ordered retroactive payment to the parents from the time they rejected the educational plan and placed their child in the private school which was ultimately ordered by the hearing officer.

The court refused to look beyond the record of the administrative hearing in rejecting the town's argument that the evaluation on which the

hearing officer relied was outdated. The court said: "Plaintiffs had a full opportunity to present evidence in support of its position before the (hearing officer)."

Finally, in Mac Isaac v. Department of Education (No. 9820, November 22, 1978), the Massachusetts Superior Court upheld the decision of a hearing officer ordering a public school, "substantially separate program" rather than the residential placement preferred by the parents. In setting forth the standard for review the court said: "Unless the findings of the agency are wholly lacking in evidential support or tainted by error of law, the court must defer to the decision of the agency." The court then concluded, after briefly reviewing the evidence, that "the defendant's plan is not an error of law, not unsupported by the evidence, not arbitrary and capricious, and not unwarranted by the facts as plaintiff alleges."

The court acknowledged that there were "different points of view before the Core Evaluation Team regarding the necessity of a residential placement." However, it refused to second-guess the hearing officer particularly where the "least restrictive" of the alternatives had been recommended:

> At most it can be said that there were alternative courses of action which could have been considered appropriate. In accordance with 221.3 of the Regulations, the team merely chose the least restrictive of these alternatives. Moreover, under Section 326.0 a child should be placed in his regular education program pending resolution of appeals.

What conclusions can be drawn from these court decisions which have reviewed the decisions of hearing officers? First and foremost is that, as in other areas of law where a court reviews the decision of an administrative agency, great deference will be given to the expertise of the hearing officer. The courts will be reluctant to second-guess the hearing officer by reinterpreting the evidence or looking beyond the "record on appeal" to new evidence. Occasionally this will happen, as in LeDrew, where a combination of facts, including the child's failure to progress in public school, resulted in a more penetrating review of the

record than would normally take place. It is not insignificant, however, that all of the decisions, except LeDrew, upheld the decision of the hearing officers.

With regard to the LRE requirement, four of the six cases ordered placement in the less restrictive of the choices offered. In two of these four cases, one the federal case, the LRE requirement was explicitly cited and relied upon as part of the overall standard of appropriateness. The LRE requirement was acknowledged in one of the two cases where the more restrictive placement was ordered with the judge responding to the presumption or preference of the law for the LRE requirement by noting that the more restrictive placement in that case (LeDrew) was also the only appropriate one offered. Thus, there is a clear division among the decisions concerning the relevance and importance of the LRE requirement as an explicit factor in the outcome of the case although, in a majority of the cases, the less restrictive placement was ordered.

One additional fact which is significant is that, in all six cases, the parents were arguing for the more restrictive environment. As will be discussed in the next section, parental preference for the more restrictive environment characterizes most of the administrative decisions. This tug of war between parents and school systems over the adequacy and desirability of public and private placements frequently involves concerns about good faith on both sides, although these concerns are generally not stated in those terms. From the parents' perspective, the issue very simply is whether the school system can and will actually do what it says, particularly in light of past failures. From the school system's point of view, the issue is whether the parent is merely trying to have a private placement funded by the school system or is actually willing to give the school system the chance to demonstrate that it can do a good job. Those issues are discussed in more depth in the section which follows.

C. Implementation of the LRE Requirement by Decision-Makers at the Administrative Appeals Level

1. Introduction and Analysis

The purpose of this section is to review and analyze a sample of administrative decisions resulting from disputes between parents and school systems over special education placements. With a few exceptions, these decisions are not reported in any standard reporting system. Therefore, to secure a sample of decisions for analysis it was necessary to contact selected states and to have the decisions reproduced and mailed. Nine states were selected, based upon their level of activity in deciding administrative appeals. These particular states were selected because of the likelihood that since the inception of P.L. 94-142 on September 1, 1977, they would have had a minimum of 20 administrative appeals decisions.

Each of the nine states was asked to send 40 of its most recent decisions at the highest administrative level (where the facts of the case were fully discussed) or all of its administrative decisions at that level since September 1, 1977 if this was less than 40. Decisions at the highest administrative level were requested so that the sample would reflect the "final word" in the state on the implementation of the LRE requirement. Forty decisions were asked for in the hope that a minimum of 10 and a maximum of 20 would contain a placement decision with sufficient supporting information to indicate whether and to what extent the LRE requirement was reflected in the decision.

A total of 295 decisions were received of which 121 were usable for purposes of this analysis. One hundred seventy-four were not usable for a wide variety of reasons, most having to do with the fact that they did not decide the issue of placement. These "non-placement decisions" involved issues such as procedural irregularities, insufficient information to make a placement decision, retroactive reimbursement for unilateral private school placements made by parents, additional services within a program agreed upon by the parents and school system, interim placement of children pending the outcome of the appeals process, parents objecting to the issuance of a diploma, etc. Since they did not result

in placement decisions, they were not relevant to the purpose of the study. Some decisions were unusable because of poor duplication, making them illegible, or because they did not contain sufficient information about the placement alternatives.

In asking the states for their most recent decisions, we did not ask for placement decisions in which the LRE requirement was at issue because one purpose of this study is to determine whether the LRE requirement is reflected in placement decisions. We asked for the most recent decisions because of the greater likelihood that these would reflect more of the requirements of P.L. 94-142 than the earlier decisions which were made when the law was first being implemented and was not as well understood because of a lack of experience with its provisions.

All of the placement decisions were read, reviewed and analyzed from the perspective of the LRE requirement. The review and analysis utilized the format of two analytical instruments which are attached to this report: a "Content Analysis Checklist" and a "Content Analysis Summary Form". Both of these are designed to elicit from the decisions information relevant to the implementation of the LRE requirement, with the "Summary Form" being the basic reporting form, utilizing the "Checklist" as a cross-reference to insure completeness of the reporting.

The following is a state-by-state summary of this review and analysis. Each state is referred to by a number and its appeals system is briefly described so that the reader can be aware of the level of the particular decision which is being reviewed. A cumulative summary of the information described is presented on the chart entitled "Cumulative Summary of State Administrative Decisions."

a. State number 1

This state utilizes a "two-tier" administrative appeals system, with a full due process hearing by an impartial hearing officer appointed by the local educational agency and a subsequent review by the state Commissioner of Education. The decisions reviewed here are those of the Commissioner of Education.

A total of 12 decisions was reviewed. Of these, 10 were appeals by parents and 2 by local educational agencies (LEAs). Of the 10 appealed by parents, they won in 5. Of the two appealed by the LEAs, the parents won both. Thus, of the 12 appeals, 7 were won by parents.

Parents wanted the more restrictive alternative in 7 cases and the less restrictive alternative in 5. When the parents wanted the more restrictive alternative, they won in 3 and lost in 4; when they wanted the less restrictive alternative they won in 4 and lost in only 1. In the one case where the parents wanted the less restrictive alternative and lost, the dispute was over the fact that the LEA wanted to classify the child as "emotionally disturbed" and the parents wanted a classification of "learning disability."

The LRE requirement was explicitly discussed in 5 of the 12 cases; the less restrictive alternative was ordered in 8 and not ordered in 4. In the 8 cases where it was ordered, it was discussed in only 3 and not discussed in 5. In the 4 cases where the more restrictive alternative was ordered, LRE was discussed in 2. In all cases, the appropriateness of the placement was the overriding standard of decision.

There were several outstanding decisions implementing the LRE requirement of which one in particular should be noted. In this case, an LEA wanted to place a five-and-a-half-year-old boy who had been severely burned in a home fire in a special school for physically handicapped children. The parents wanted him to enter a regular kindergarten class with supportive services to compensate for the loss of all of his fingers on the right hand and two on the left hand. After noting that "both

federal and state law require that handicapped children be educated in the least restrictive environment to the extent possible" the Commissioner reached the following conclusion:

> There is no dispute in the record regarding T.'s intellectual and academic abilities. T. is a perceptive and articulate child. Further, the record indicates that T. is currently able to use a pencil and that through reconstructive surgery he will be better able to manipulate writing instruments in the future. There is much testimony in the record which relates to the reactions of the students and staff when they first meet T. due to his physical appearance. The transcript contains testimony which indicates that one of respondent's major concerns relates to the potential disruptive effect that public school placement might have on T. and his fellow students. However, there is no educational justification for special classroom placement predicated primarily upon cosmetic disfigurement where such disfigurement does not seriously interfere with the child's ability to function in a regular classroom.

Several other decisions should be noted because they are illustrative of certain key issues related to the implementation of the LRE requirement. In one decision, the Commissioner of Education considered the relative merits of two programs to be relevant to the issue of which was more appropriate. This is significant because in other states many decision-makers do not look beyond the issue of whether the LEA program is adequate and appropriate, regardless of the existing alternatives. Here, the Commissioner said:

> While it is true that a board of education is required to provide an appropriate program rather than an optional program, the evidence here sustains the conclusion that the program recommended by the (board of education) would result in progress so inferior to that which G. showed himself capable of in the (private day) program as to render the (public school) program inappropriate.

The Commissioner then ordered the more restrictive alternative--the preference of the parents.

In another decision where the parents wanted either a private school placement or more special education services in the public school to enable their child to remain in a public school placement, the Commissioner addressed the issue of certain criteria which an LEA may not use in making a placement decision:

> It is not sufficient for (the board of education) to provide for J.'s educational needs solely on the basis of the programs it has available. The issue is whether the proposed program is appropriate, rather than available. It is essential that the (board of education) consider J.'s individual educational needs and that it recommend a placement and program based on those needs.

In two cases in which the more restrictive placement was ordered, the Commissioner addressed the LRE requirement and found it to be subordinate to other factors. In one case, after summarizing the LEA's argument in favor of the least restrictive placement, the Commissioner found that the LEA's less restrictive program was inappropriate to the child's needs:

> The program provided in petitioner's school district consists of regular class placement with resource room services. There is no self contained class. While mainstreaming is important, it must be used only where it is appropriate for the student and to the degree to which it is appropriate. The record indicates that K.'s academic achievement is not keeping pace with that of his peers. His handicapping condition requires an increasing amount of special or support services and it does not appear that the program in petitioner's district would provide K. with the structured, self-contained situation which he needs.

In another case where the child's needs were found to outweigh the benefits of "mainstreaming," the Commissioner, in ordering the more restrictive placement, concluded that:

> The availability of mainstreaming opportunities is, of course, an important consideration. However, the needs of the pupil must determine whether mainstreaming at this point in time is appropriate. In this instance, the record contains unrebutted evidence that J. could not benefit from mainstreaming during the 1978-79 school year. A child with an attention span of less than two minutes (as indicated by the testing) is not ready for enrollment in a program in which independent work is a significant aspect.

Unlike the two cases just discussed, most of the cases in which the more restrictive placement is selected do not discuss the LRE requirement. This is indicative of the fact that the Commissioner views the requirement as "important" but not as a "presumption" requiring an explanation when a more restrictive alternative is ordered.

In a number of cases, the dispute over the placement is inseparable from a dispute over labeling the child. Thus, of the four "main labels,"

"learning disabilities" is preferred by parents, with "physically handicapped" second, "emotionally disturbed" third and "mentally retarded" last. Thus, fights over more or less restrictive placements are frequently couched in terms of debates over labels for the child's handicap. These cases point up the hazards of narrow labeling, particularly in the way such labeling tends to reduce the placement options in such a manner that no agreement can be reached between the parties. Thus, for example, the dispute over labels often reflects the fact that for one label such as "learning disabilities" a full continuum of services exists while for other labels such as "educable" or "trainable mentally retarded" only one or two options exist such as a "self-contained class."

The decisions of this state were characterized by a great deal of independence by the Commissioner of Education and careful scrutiny of LEA proposals. This is illustrated by the decision in the case of an "autistic child" where the Commissioner reversed the hearing officer's decision in favor of an LEA program and ordered a residential placement desired by the parents. The Commissioner said:

> (M) has attended the (LEA placement) since September, 1967 when he was enrolled there by his parents . . . . A hearing officer (found this) placement 'adequate and appropriate for educational purposes.' After reviewing the record, I disagree . . . . During the ten year period in which M has attended school, there has been little, if any, educational gain. The nature and extent of M's condition is such that little improvement could be expected within a normal school day of one five and a half hours . . . . As a young adult who may be able to function on a more independent level with the benefit of a more intensive program, this boy should be afforded a residential program designed to strengthen and continue the formal daily educational program which he should be engaged in.

b. State number 2

This state utilizes a variation of a "one tier" administrative appeals sytem, with a full due process hearing by an impartial hearing officer appointed by the state. The decisions reviewed here are those of the impartial hearing officer.

A total of 20 decisions was reviewed. Of these, the parents appealed in all. The parents won in 14 and the LEAs in 6. The parents wanted the more restrictive environment in 19 of the 20 cases. In the twentieth case, the parents wanted a placement in a regional vocational technical high school rather than a more special education oriented local vocational education program.

The least restrictive alternative was ordered in 7 of the 20 cases and discussed in 4 of these. Of the other 13, the LRE requirement was discussed in 2. In general, the "adequacy and appropriateness" of the placement was the overriding placement standard.

As in state number 1, but even more so, very little difference was given to the placements proposed by the LEAs, i.e., LEA proposals were carefully scrutinized and frequently rejected where there was substantial evidence that the LEA program was lacking in one or more important respects. Past success or failure of the LEA in meeting the child's needs was a key factor in the decisions as was the related issue of "good faith" on the part of the LEA. In one case in which the hearing officer ruled in favor of the parents, for example, the hearing officer said:

> Had appropriate services been furnished this child in the past, the restrictive step of a private day placement might now not have been necessary. In light, however, of past failure on the part of the (LEA) to adequately serve L., it is now educationally necessary for her to have the opportunity of participating in a full day, specialized total program. It is too late in the day for this 14 year old high school student to waste any more valuable educational time.

The decisions in this state are particularly illustrative of the fact that where the parents make an excellent presentation with the use of a full panoply of experts, they are likely to prevail over a less well prepared LEA. The importance of the independent evaluation to the parents' presentation is also clear from these cases since extensive independent evaluations are presented in virtually every case and, particularly, in the cases won by the parents. Also important, is the testimony of private school personnel from the private school which the

parent prefers. These personnel frequently act as the "lawyers" for the parents in addition to an attorney.

As in state number 1, the LRE requirement is subordinated to the needs of the child and is not mechanically applied as in some states. For example, in one decision ordering a more restrictive placement, the hearing officer said:

> I am mindful of the requirement that the least restrictive but appropriate prototype be approved, and I am, of course aware that the residential placement is the most restrictive placement. The evidence before me with respect to learning disability remediation indicated that although K. had made some progress last year in the areas of fine and visual motor controls he had not shown any growth or progress non-verbally. I do not find the small gains shown last year in fine and visual motor control sufficient to justify continued placement in the kind of substantially separate program offered by the (LEA) this year.

In summary, the most striking feature of the decisions of this state is the total lack of mechanical allocation of any standard, be it "appropriateness" or "least restrictive environment." Also notable from the perspective of the LRE requirement is that the decision-makers do not treat the requirement as a presumption and rarely discuss it when ordering a more restrictive alternative.

c. State number 3

This state utilizes a "two tier" administrative appeals system, with a due process hearing by an impartial hearing officer appointed by the state and a subsequent review by the state Secretary of Education. The decisions reviewed here are those of the state Secretary of Education.

A total of 19 decisions was reviewed. Of these, the parents appealed in all. Unlike state number 2, where the parents won in a majority of the cases, the parents won in only 3. The parents wanted the less restrictive placement in 3 of the 19 cases and won in 2. In the case the parents lost, they wanted a total regular education placement and denied that their child had any special needs. In the 16 cases in which the parents wanted the more restrictive placement, they won in only 1.

The least restrictive environment was ordered in 17 cases and discussed in 10 of these. In the two cases it was not ordered, it was not discussed.

In general, particularly compared to the first two states discussed, the parents prevailed only once when they were seeking a private school placement. Also, as might be expected from the fact that parents won more infrequently, much greater deference than in the first two states discussed was given in this state to LEA proposals. This is illustrated by the following statement of the Secretary of Education in ordering an LEA placement:

> Finally, M.'s mother alleged that the hearing officer overlooked the district's failure for five years to both evaluate M. and (consequently) provide M. with an appropriate program of special education. Though this allegation, if true, is unfortunate and may have been detrimental to M.'s education, nevertheless, it is not an appropriate and relevant consideration at a due process hearing. The purpose of this hearing is to determine the appropriate special education placement to which M. is now entitled and which his district must now offer him . . . . There is no requirement that the hearing officer must somehow punish the district for its past failures towards M. by ordering that M. be placed in a private school.

In another case, the preference for the public school program over a private school placement was based squarely on the LRE requirement and on a presumption that public school placements are, per se, less restrictive than private school placements. In this decision, the Secretary said:

> We note that, in contrast to the content in S.'s mother's appeal, the (LEA) proposal for S.'s education does offer the least restrictive educational environment for her. We find so on two grounds. Firstly, the significant mainstream component of the proposed (LEA) program clearly conforms to the mainstreaming requirement in the state regulations. This type of integration with non-handicapped peers is, we find, virtually non-existent in approved private schools such as (the school proposed by the parent). This leads us to our second point, that being that the regulations, in the priority order of placement sections, recognize that public school placements are, by definition, less restrictive than private school placements. . . .

Thus, it is not surprising that the decisions of this state reflect a strong bias against private school placements, considering both the deference given to LEA proposals and, more philosophically, the emphasis placed on the LRE requirement.

d. State number 4

This state has a several tier administrative appeals system, with a due process hearing by an impartial hearing officer appointed by the state and subsequent reviews by the state commissioner of education, the state board of education and, ultimately, the courts. The decisions reviewed here are those of the impartial hearing officer.

A total of eight cases was reviewed. Of these, the parents appealed in all. The parents won in 4 and lost in 4. The parents wanted the less restrictive placement in 4 of the 8 cases and won in 2 of these. In the 2 which the parents lost where they wanted the less restrictive environment, they asked for a total regular education placement and the removal of the label "emotionally disturbed" from their children.

The less restrictive placement was ordered in 4 of the 8 cases. The LRE requirement was not discussed in the 4 cases where the more restrictive placement was ordered, but was discussed in 2 of the 4 cases where the less restrictive placement was ordered.

As in the other states the importance of the independent evaluation to the outcome of the case was very evident. Where there was no independent evaluation or where the parents' expert testimony was minimal, the parents generally lost. It was particularly notable in this state that the hearing officer ordered an independent evaluation in several cases.

In general, less deference was given to LEA proposals compared to state number 3. This is illustrated by the following excerpt from a decision in which a private school placement was ordered over the protest of the LEA:

> (The LEA's) team concludes that S.F. lacks internal controls, insights to his behavior, and has little motivation to change his inappropriate lifestyle; yet they condition each of the educational goals and objectives for S.F. upon his having these same traits it concludes he lacks. The (hearing officer) finds it difficult to follow the decision making processes used to come to these seemingly disparate conclusions in educational planning.

(e) State number 5

This state has a "two tier" administrative appeals system with a due process hearing by an impartial hearing officer at the local level and a review by the State Superintendent of Public Instruction. The decisions reviewed here are those of the State Superintendent of Public Instruction.

A total of 11 cases was reviewed. Of these, the parents appealed in 9 and the LEA in 2. The parents won in only 2 cases which they appealed, and in 1 of the cases appealed by the LEA. The parents wanted the more restrictive placement in all 11 cases.

The less restrictive alternative was ordered in 8 of the 11 cases and the LRE requirement was discussed in 4 of those, although in a mechanical manner. The LRE requirement was not discussed in the three cases where the more restrictive placement was ordered.

In general, "appropriateness of the placement" was tje principal and overriding standard of decision. The basic issue in all cases was whether the LEA had an appropriate program. Only where the LEA obviously did not have such a program were alternative placements, such as the placement desired by the parents, discussed. Unlike the previous four states, the parents' preference was frequently not indicated, making many of the decisions unusable for purposes of this review.

f. State number 6

This state has a two tier administrative appeals system, with a review at the local level and a due process hearing by an impartial hearing panel at the state level. The decisions reviewed here are those of the hearing panel.

A total of 12 decisions was reviewed. Apparently, the parents appealed in all of these although this was not clear from the decisions. The parents won in 4 of these and lost in 8. The parents wanted the more restrictive placement in 10 cases and the less restrictive in 2. In 1 of these 2 the parents won. The parents also won in 3 of the 10 cases in which they wanted the more restrictive placement. In the case which the

parents lost where they wanted the less restrictive placement, the hearing officer ruled partly in their favor by ordering an integrated program for part of the day.

The less restrictive placement was ordered in 8 of the 12, and in 2 of these the LRE requirement was discussed. It was not discussed in any of the cases where the more restrictive placement was ordered.

As in the case of state number 5, the adequacy and appropriateness of the LEA program was the sole placement standard. Thus, alternatives were discussed only if the LEA program was clearly inadequate. A greater effort was apparent than in some states to determine if the LEA actually had a program and was acting in good faith. Generally, more restrictive placements were ordered in cases where the LEA had been negligent in the past in meeting the child's needs.

g. State number 7

This state has a several tier administrative appeals system originating at the local level, with a due process hearing by an impartial hearing officer at the state level and a subsequent review by the state Superintendent of Education. The decisions reviewed here are those of the state Superintendent of Education.

A total of 12 decisions was reviewed, of which 11 were appeals by parents and 1 by an LEA. In the 11 cases appealed by parents they won 4. The case appealed by the LEA was also won by the parents. The parents wanted the more restrictive placement in 8 of the 12 cases and won in only 2 of these. In the 4 cases in which the parents wanted a less restrictive placement, they won in 3. In the fourth, the "restrictiveness" of the program was due to its relative distance from home compared to the other program.

The less restrictive environment was ordered in 9 of the 12 cases, and in 2 of these it was explicitly discussed. The LRE requirement was not discussed in the three cases where a more restrictive placement was ordered.

In this state, the LRE requirement was rarely at issue in the decisions, although public school placements were heavily favored over private school placement. This is, in large part, because of a state statute which specifies that private placement shall occur only when a child's needs are "so profound, complex or otherwise unique that no special education program offered by the public school can adequately or appropriately meet his or her needs . . . ." Thus, in several cases where the LEA clearly had not developed an appropriate program, an LEA placement was ordered anyway. In this state, therefore, there is a strong policy favoring less restrictive placements, but this policy is expressed primarily in terms of opposition to private school placements and acceptance of LEA proposals at face value.

h. State number 8

This state has a one-tier administrative appeals system for the review of cases involving private school placements with a due process hearing before an impartial review panel at the state level. Virtually all of the cases reviewed here are in this category.

A total of 20 cases was reviewed. Of these, the parents appealed in all. The parents won in 8 and lost in 12. The parents wanted the more restrictive placement in all 20. The less restrictive environment was ordered in 12 cases, and the LRE requirement was discussed in 4 of these. In the 8 cases where a more restrictive placement was ordered, the LRE requirement was discussed in only 2.

In general, the less restrictive placement was ordered less often than in most of the other states reviewed. This is due, in large part, to the fact that the LEA generally supports the parents' request for the more restrictive placement. (Probably this state has a funding system for private placements which places little or no responsibility on the LEA.) Thus, it is difficult to compare the results here to those in other states.

i. State number 9

This state has a two tier administrative appeals system with a due process hearing by an impartial hearing officer at the local level and a subsequent review by a state appointed hearing officer at the same level. The decisions reviewed here are those of the state level hearing officer.

A total of seven cases was reviewed. The parents appealed in all of these cases. Of these, the parents won 3 and the LEA 4. The parents wanted the less restrictive placement in 2 cases and lost in both. In one, the LEA wanted the child to go to a "TMR" program in another school while the parents wanted the child to remain in an "EMR" program in his current school. In the other, the LEA wanted the child to be in an intensive "TMR" program in a special public school facility while the parents wanted the child to remain in the current public school placement in a special class for "autistic" or "emotionally disturbed" children. In the three cases won by the parents where they wanted a more restrictive placement, the placement consisted of increased special education services in a public school in two and a private school placement in the third.

The less restrictive placement was ordered in only 2 of the 7 cases and the LRE requirement was discussed in 1 of these. In the other cases, the LRE requirement was discussed in 2. Unlike the other states, in all but one of the decisions, the dispute was over two public school alternatives.

In general, as in the other states, "appropriateness" was the main standard for the placement decisions. Also, although the sample is relatively small, it is evident that considerable deference was given to the placement proposals of the LEAs. These decisions were characterized by extensive labeling of children with the result that many of the placement disputes were also discused over the children's labels.

In one case, a hearing officer found that a part-time tutor in a regular classroom constituted a more restrictive situation than the child being taken from the class for one and a half hours, five days a week, to work with a learning disabilities specialist:

> A "qualified tutor" assigned to a handicapped child within the regular classroom setting for any significant period of time appears, in the opinion of the State Hearing Officer, to be a misinterpretation of the concept of "least restrictive environment" as referred to in . . . P.L. 94-142. A child in a regular classroom , , , attached by an umbilical cord to an adult tutor for the purpose of "keeping him directed in his work" . . . is a much more restrictive environment than the placement of that child in a setting where these activities can be accomplished without the presence and pressure of peer observation and knowledge.

This interpretation of the LRE requirement is different from many cases where any removal from the regular classroom is considered to be more restrictive than continuing placement in that classroom, even with a tutor.

2. Summary of the administrative decisions

A compilation of the statistics for all of the nine states indicates that of 116 cases appealed by parents, they won only 47, or considerably less than half. In the 5 cases appealed by the LEAs they won only 1. Where the parents were appealing for a more restrictive placement (which was in 100 of the 121 cases, or approximately 80 percent of the cases), most frequently a private placement, they won in only 38 of 100 cases, or slightly more than a third. On the other hand, where the parents wanted a less restrictive placement, usually a public school placements, they won in 13 of the 31 cases appealed or about two thirds.

These figures indicate that the parents lose many more cases on appeal than they win, largely because of local and state resistance to more restrictive placements and, in particular, to private school placements which comprised almost all of the more restrictive placements desired by parents. On the other hand, one area where parents are particularly successful in winning appeals is where they are seeking less restrictive placements for children. As indicated in the profiles of the nine states, the cases where the parents want a less restrictive placement and lose are generally cases where the issue is that the parents want no special education services. If these cases were eliminated from the sample, it is evident that parents would win almost all cases where they want a less restrictive special education program than that offered by the LEA.

The LRE requirement is discussed in less than half of the cases in which it is ordered--32 of 75. It is discussed even less where the more restrictive placement is ordered--8 of 46 cases. These figures indicate that, with one or two exceptions, the states whose decisions have been reviewed view the LRE requirement as an unimportant or unessential factor to be expressed in the placement decisions. Nevertheless, the less restrictive placement was actually ordered in a substantial majority of the cases sampled--75 of 121. Thus, although the LRE requirement is not an important explicit factor in the decisions, it may be an important implicit factor. The clear preference expressed for public school placements over private school placements, however, is only partly a function of the LRE requirement, with financial costs of private placements a key factor.

Looking at the decisions as a whole, it is evident that many factors influence the outcomes. Clearly, the LRE requirement is an important explicit factor in only a small minority of the cases. Of much greater importance is the general bias in most of the states sampled in favor of LEA placements and against private school placements. This bias is based largely on financial considerations, political factors and, in part, on philosophical and legal factors such as the LRE requirement. If frequently takes the form of routine acceptance of LEA proposals, regardless of past LEA failures or present LEA procedural irregularities.

Of the other criteria and factors which influence the final outcome, the most common explicit placement standard which appears in the decisions is that of "appropriateness." This standard is applied in a variety of ways. In most decisions, the placements proposed by the LEAs and the parents are both described, but frequently the hearing officer will focus almost exclusive attention on whether the placement proposed by the LEA is "appropriate" or "adequate" or "not inadequate" and will spend little or no time exploring the alternative proposed by the parents. In some states, notably those where the parents win relatively frequently, the placements proposed by the LEA and the parents are given equal attention in the decision.

The two factors most commonly used to determine "appropriateness" are the nature and severity of the child's handicap and the apparent (based on the evidence presented and not on the personal knowledge of the hearing officer) ability of the program offered by the LEA to respond to that handicap. In a number of cases where these factors are discussed, the hearing officer seems to equate the label given to the child and a placement which corresponds to that label. It is strikingly evident that in such cases a full continuum of placements and services is not offered by the LEA, but rather the placements considered appropriate are determined primarily by the label assigned as the child's handicapping condition. Thus, for example, the label of "multiply handicapped" (e.g., "learning disabled and brain damaged") results in one state in an automatic decision to place a child in a private school (as required by statute) while a finding of a single handicap (e.g., "learning disabled") forecloses the possibility of private school placement. Similarly, it is evident in some cases that a full continuum of services is available for children labeled "learning disabled," while only one or two segregated options are available for children labeled "trainable" or "educable mentally retarded."

Other factors mentioned less frequently in the decisions are the past history of success or failure to educate the child in the various placements being proposed or in similar placements, and the apparent good faith or lack thereof of the LEA and the parents. Also mentioned infrequently are factors such as the potential negative effect on the child's educational progress of a change from the current placement, the disciplinary problems likely to occur in the various proposed programs, and the disruptive effect which a child's presence might have due to the response of other children to the appearance of the child's handicap.

Of key importance to the outcome of a decision is how well the parties present their evidence at a hearing. Although it was not possible to quantify this factor because most of the decisions did not identify the roles of participants, it appears that a strong presentation by an LEA involving many witnesses results in a more favorable response

of a hearing officer to an LEA proposal, particularly where the good faith of the LEA is at issue. Similarly, it appears that substantial evidence from an independent evaluation and from the testimony of private school personnel is critical to the ability of parents to prevail in many cases. In the decisions where the participants are identified, lawyers are commonly used by both sides, and lay advocates are occasionally used by parents. Unfortunately, the roles of participants are identified in so few cases that the data are insufficient to draw any conclusions about the importance of lawyers and advocates to the outcome of the decisions.

IV. Conclusion

How well is the LRE requirement being implemented by judges and hearing officers? To date, the overall impact of court cases under P.L. 94-142 has been to safeguard the "continuum of alternative placements" which is at the heart of the effective implementation of the LRE requirement. Without certain placements or with biases for or against other placements, the "continuum" loses its meaning. Thus, it is significant that the litigation under P.L. 94-142 has helped to insure that all of the placement alternatives are available to all handicapped children on an equal basis, according to their particular needs. This is the current trend of the litigation.

With regard to the decisions of administrative hearing officers, the answer to this question is less clear. In general, most of the decisions do not explicitly acknowledge the LRE requirement. In particular, when more restrictive placements are ordered, hearing officers rarely rationalize their failure to order a less restrictive placement. This omission is an important one which should be rectified if the LRE requirement is to have any meaning. Perhaps the LRE requirement should be established as a presumption to be overcome in all cases where a more restrictive placement is ordered.

On the other hand, in the large majority of cases, the less restrictive placement is ordered, despite the frequent absence of any

explicit reference to the LRE requirement. One might argue, therefore, that the LRE requirement is being implemented in fact, even if not in theory. But is the LRE requirement actually being implicitly implemented or are hearing officers merely deferring mechanically to the promises of LEAs who may appear to offer the least restrictive placement but who, in fact, may be offering a "paper program" which has failed before or does not exist in the form in which it is presented? The answer to this question is far from clear and varies from state to state and from hearing officer to hearing officer.

One reason to pause before assuming that the high proportion of public school placements being ordered reflects the effective implementation of the LRE requirement is that there appears to be a strong bias against private school placements, for both financial and political reasons. Thus, the high proportion of public school placements ordered may be the result of factors other than the LRE requirement. This view seems particularly plausible when one reads decision after decision where past failures and present procedural irregularities on the part of LEAs are routinely ignored or down played by decision-makers who regularly rule in favor of LEA proposals.

Another reason to pause before taking comfort in the number of public school placements being ordered is that virtually all parents who appeal want a private school placement for their children. A great many of these parents have tried the public schools and have been very dissatisfied both with the programs offered and with the procedures followed in making placement decisions. Thus, one must ask if the large proportion of decisions in favor of the public schools reflects a rational implementation of the LRE requirement or a mere leap of faith in many situations where such faith has not been justified in the past and may not be in the present.

In general, although the decisions of the administrative hearing officers allow us to draw some general conclusions about how the LRE requirement is being applied, they are most notable for how little information and analysis they contain about the implementation of the

requirement. This is true despite the requirement of 121 a.555 of the regulations, quoted earlier, that state educational agencies shall "insure that each public agency establishes and implements procedures which meet (the LRE requirement)". The adminitrative decisions give little indication that such procedures have been established for administrative hearing officers. For example, even where the LRE requirement is discussed in the administrative decisions, the discussion is generally minimal and perfunctory with little or no definition of the LRE requirement, a mere repetition of the phrase "least restrictive environment" and an absence of any analysis of the relevance of the requirement to the particular case.

If administrative hearing officers are to participate in the implementation of the LRE requirement, it will be necessary for them to address that requirement more explicitly than they now do. In particular, procedures and standards might be established requiring that the following information, which is necessary to the proper implementation of the LRE requirement, be presented at the hearings and included in their decisions:

1. A descriptive definition of the LRE requirement, indicating its relationship to the broader standard of an "appropriate placement" (this might include a statement of whether there is a presumption in favor of the least restrictive placement or whether the LRE requirement is merely one of several factors to be considered;
2. A detailed description of the child's current placement;*
3. A discussion of the arguments of both sides concerning why they consider the current placement to be appropriate or inappropriate;
4. A detailed description of the proposed placement including a discussion of the arguments of both sides for and against this placement;

*The description of all placements should be in sufficient detail so that a clear indication is given of time to be spent with non-handicapped peers in the various programs, e.g., phrases such as "private day school" or "resource room" would be insufficient without further elaboration because they do not provide such indication.

5. A discussion of whether the proposed placement actually exists or is likely to exist when it is needed;

6. A discussion of the success or failure of past efforts to provide appropriate placements for the child;

7. An estimate of the good faith of the party proposing the placement;

8. A discussion of the past performance of the child in relation to the placement which is being proposed, e.g., an indication of whether the child has had a record of failure or success in similar programs;

9. An analysis of whether the placement which is being ordered is more or less restrictive than a) the child's current placement, and b) the placement being proposed by the losing party if that placement is different from the current one;

10. An analysis of the actual weight given to the LRE requirement relative to other considerations, particularly where the most restrictive of the placement alternatives is the one being ordered, but also in other cases (this should be a detailed analysis rather than a mere pro forma repetition of the LRE requirement); and

11. A discussion of the specific conditions which need to be satisfied for a child to move to a less restrictive placement in the future.

Most of this information is currently not provided in the large majority of decisions of hearing officers. Procedures and standards requiring this information to be presented at hearings and included in decisions would have at least two beneficial results. First, some substance would be provided to the general standard of "appropriateness" giving the parties and the hearing officer some guidelines for determining when a placement is appropriate. Second, persons reviewing the decisions, such as chief state school officers and judges, would have a sufficient basis for determining the manner and extent to which the requirement is being implemented. Both of these results would improve the decision-making process.